

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**CORA SHIRLEE COUNTERMAN**

Claimant

VS.

**ECONO LODGE OF DODGE CITY**

Respondent

AND

**KANSAS RESTAURANT SELF-INSURANCE FUND**

Insurance Carrier

AND

**WORKERS COMPENSATION FUND**

Docket No. 198,417

**ORDER**

Claimant requests review of the Preliminary Hearing Order of Special Administrative Law Judge Leroy C. Rose entered in this proceeding on September 29, 1995.

**ISSUES**

The Special Administrative Law Judge denied claimant's request for medical benefits. The sole issue before the Special Administrative Law Judge and now before the Appeals Board is whether claimant is entitled to workers compensation benefits for injury or aggravation to her knees.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After a review of the entire record, for purposes of preliminary hearing the Appeals Board finds:

(1) The Appeals Board has the jurisdiction and authority to review the preliminary hearing findings of the Special Administrative Law Judge pursuant to K.S.A. 44-534a because the issue relates to the question whether claimant has sustained personal injury by accident arising out of and in the course of her employment with the respondent.

(2) The preliminary hearing finding that claimant is not entitled to medical benefits under the Workers Compensation Act for treatment of her bilateral knee condition should be reversed.

On March 2, 1994 while at work, claimant slipped on ice and fell injuring both knees. Since that date claimant has experienced pain in her knees and has had difficulty walking and climbing stairs. This conclusion is based both upon claimant's testimony and that of her supervisor, respondent's general manager Dennis Doris. Before this accident, claimant had problems with either one or both knees and had on occasion consulted her personal chiropractor for treatment. After the March, 1994 accident, claimant returned to her

chiropractor for treatment. After a period of time, the respondent and insurance carrier referred claimant to orthopedic surgeon Kenneth A. Jansson, M.D., who examined her on July 25, 1994.

In his letter dated January 16, 1995, Dr. Jansson wrote:

"I would have to agree that the majority of Shirlee's problems seem to be related to her degenerative arthrosis and probably a total knee replacement is the treatment of choice in her case, as Dr. McQueen concurs. I would have to say that the total knee replacement is necessitated primarily by her progressive degenerative arthritis, which was really unrelated to the fall on the ice of 2 March 1994. It was, however, the fall on the ice on 2 March 1994 that precipitated her seeking medical attention, and I think this was an exacerbating factor.

"In terms of a rating, I would probably rate her as a partial permanent rating of 40% of the lower extremity on both knees of which 5% of the lower extremity on each knee is attributable to the fall on the ice on the 2nd of March 1994, and the remaining 35% of each knee attributable to progressive arthritis."

One of Dr. Jansson's medical partners, orthopedic surgeon David A. McQueen, M.D., examined claimant on September 22, 1994 at Dr. Jansson's request. In his letter dated June 29, 1995, Dr. McQueen wrote:

"As you know, Ms. Counterman has been evaluated and treated by me for degenerative osteoarthritis of her knees. It is my opinion that Ms. Counterman did in fact have a pre-existing condition of her knees. The diagnosis of that pre-existing condition is degenerative osteoarthritis. It is my opinion that she was probably going to require bilateral total knee arthroplasty without regard to this work related injury. It is further my opinion that this injury did in fact aggravate the condition in her knees. I have previously communicated with Mr. Jeff Tevis of KRHA and in the letter of January 16, 1995 indicated that a permanent impairment rating of 40% to the lower extremity is for both of her knees. It is my opinion that 5% be attributed to the fall in March of 1994 and the remaining 35% attributable to the progressive osteoarthritis of her knees."

At his deposition Dr. McQueen testified:

"Q. Based upon your reading of that social history and your examination of her and whatever social history of her you took yourself, did you come to the conclusion that the fall that she experienced in March of 1994 speeded up her need for total knee arthroplasty above what it would have been otherwise?

"A. Yes.

"Q. What was that opinion?

"A. That it did.

"Q. It speeded it up, made it needful more quickly than otherwise would have been the case?

"A. Right.

"Q. Indeed, doctor, and I point out to you what is in front of you marked Claimant's Exhibit 1 and call your attention to the page that is numbered one hyphen seven. It is the bottom one of that stack of pages. Did you write a letter to Mr. Rebein in which you stated that you believed that five percent permanent impairment of the lower extremities, in other words, the legs, could be attributed to her fall in March of 1994?

"A. Yes

"Q. Is that your opinion today?

"A. Yes."

The respondent also presented the letter of orthopedic surgeon C. Reiff Brown, M.D., dated May 10, 1995. Dr. Brown believes that "... there is no objective evidence whatsoever that the injury that occurred in March of 1994 had a permanently aggravating affect on her degenerative disease," and that the degenerative change in claimant's knees was relatively mild.

The Appeals Board finds the opinions of Dr. McQueen and Dr. Jansson to be more persuasive and that the fall on March 2, 1994 aggravated the pre-existing osteoarthritis in claimant's knees and accelerated the necessity for surgery.

The rule regarding pre-existing conditions is well established in Kansas. An accidental injury is compensable under the Workers Compensation Act where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction. See Claphan v. Great Bend Manor, 5 Kan. App. 2d 47, 611 P.2d 180, rev. denied 228 Kan. 806 (1980) where the court found the work-related injury accelerated the claimant's cancerous tumor by three (3) to six (6) months and, therefore, claimant was entitled one hundred percent (100%) permanent partial general disability benefits under the Workers Compensation Act.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Special Administrative Law Judge Leroy C. Rose should be, and hereby is, reversed; that this case is remanded to the Special Administrative Law Judge for further proceedings consistent with this opinion.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1995.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Henry A. Goertz, Dodge City, KS  
David J. Rebein, Dodge City, KS

**CORA SHIRLEE COUNTERMAN**

**4**

**DOCKET NO. 198,417**

John Carpenter, Great Bend, KS  
Leroy C. Rose, Special Administrative Law Judge  
Philip S. Harness, Director